

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2261/P1dn
RCT:jld:jf

July 15, 2013

Mark Florian:

This is a preliminary draft of the proposal relating to areawide water quality management planning. This area of the law is difficult to understand and draft in part because the terminology used in federal law, in state statutes and rules, and in practice is not always consistent. Additionally, although the subject involves a range of important matters, there is very little on the subject in state statutes.

I hope that this note provides some helpful context.

Federal law

In 33 USC 1288 (often referred to as section 208) the federal Clean Water Act requires each state to conduct an areawide waste treatment management planning process. For the purpose of areawide waste treatment management plans, this provision required the governor to initially designate each area of the state that had substantial water quality control problems. For each designated area, the governor must designate a single representative agency capable of developing effective plans (33 USC 1288 (a) (2)). (Governors may designate additional planning areas and agencies after making the initial designations.) Finally, this provision requires the state to act as a planning agency for the parts of the state that are not designated by the governor.

Under 33 USC 1288 (e), a state may not issue a water pollution discharge permit that conflicts with an approved areawide waste treatment management plan.

Under 33 USC 1313 (e) (3) (B), approved areawide waste treatment plans are incorporated into the broad water quality management plans produced through the continuing water quality planning process required under 33 USC 1313 (e).

EPA's regulations relating to water quality management planning are in 40 CFR part 130. The regulations require each state to have a continuing planning process, which is reviewed periodically by EPA (40 CFR 130.5). The regulations prohibit the approval of the wastewater discharge permit program of a state whose continuing planning process is not approved by EPA. States and designated agencies must update water quality management plans to reflect changing conditions and new requirements and EPA may require the plans to be updated as needed (40 CFR 130.6 (e)). A state must submit for EPA approval a letter certifying that updates to a water quality management plan are consistent with other parts of the plan.

I am uncertain whether the part of this proposal that provides automatic approval if DNR misses the deadline to act on a proposed revision to an areawide water quality management plan (which is part of this state's federally required water quality management plan) is consistent with federal law.

State law

Section 283.83 (1), Wis. Stats., requires DNR to establish a water pollution control planning process that results in plans for all waters of the state. The plans must include the provisions specified in s. 283.83 (1) (a) to (h). These provisions correspond generally to the required provisions of a state water quality management plan specified in federal law (33 USC 1313 (e) (3) (A) to (H)). I believe that the reference in s. 283.83 (1) (b) to areawide waste management plans refers to the areawide waste treatment management plans under 33 USC 1288, discussed above.

The Wisconsin statutes do not address who prepares water quality management plans or portions of those plans or how they are revised.

DNR's rules concerning water quality management plans are in chapter NR 121, Wisconsin Administrative Code.

Section NR 121.04 (2), Wis. Adm. Code, provides that the state water quality management plan consists of areawide water quality management plans prepared by agencies designated by the governor for areas designated by the governor, areawide management plans prepared by DNR for the rest of the state (nondesignated areas), and a document describing the state's water quality management planning process.

The rules do not distinguish between areawide waste treatment management plans required under 33 USC 1288 and the broader water quality management plans required under 30 CFR 1313 (e).

Section NR 121.05 describes the content of areawide water quality management plans. The plans are required to cover many subjects, including water quality standards, total maximum daily loads and waste load allocations (used to ensure that streams with poor water quality meet water quality standards), and best management practices for the control of nonpoint source pollution (NR 121.05, Wis. Adm. Code). Also, s. NR 121.05 (g) 2. requires that an areawide plan delineate a sewer service area for existing and proposed treatment systems.

Section NR 121.06 describes the designation of areawide water quality planning areas and designated agencies for those areas. A designated agency may be either a regional planning commission or another representative organization that includes local elected officials.

Section NR 121.07, Wis. Adm. Code, specifies procedures for adoption, revision, and approval of areawide water quality management plans for designated areas of the state (that is, those for which designated planning agencies, rather than DNR, prepare the water quality management plans). DNR reviews and approves plans developed by the designated planning agencies for these areas. Under s. NR 121.07 (3), DNR may approve revisions of areawide water quality management plan for a designated area

on an annual basis or according to procedures established by DNR and the designated agency. The rule does not address who may propose a plan revision to a designated agency.

Section NR 121.08 specifies procedures for adoption and revision of areawide water quality management plans for nondesignated areas of the state (that is, those for which DNR prepares the water quality management plans). Section NR 121.05 (1) (g) 4. a. provides that the preparation of the plan for a nondesignated area will be carried out by a local planning agency under contract with DNR, if possible. Under s. NR 121.07 (3), DNR may revise areawide water quality management plans for nondesignated plans as necessary. The rule does not address who may propose a plan revision to DNR.

According to DNR's Internet site, changes related to a sewer service area may be initiated by the area water quality planning agency (I believe that this would include an agency with which DNR contracts in a nondesignated area), the designated management agency (that is, the operator of the sewage system), or an entity seeking designated management agency status (an entity seeking to construct and operate a sewage system for an unsewered area, for example). The Internet site goes on to say that changes requested by private parties should be channeled through the appropriate local agency.

Please consider whether you want the draft to specify who may request DNR to revise an areawide water quality management plan. If the draft does not specify this, it might be argued that anyone may propose a revision, requiring DNR to act within 90 days in order to prevent automatic adoption of the proposed revision.

Please contact me with any questions or redraft instructions.

Rebecca C. Tradewell
Managing Attorney
Phone: (608) 266-7290
E-mail: becky.tradewell@legis.wisconsin.gov